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THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES

The right to a fair trial: Current recognition and measures necessary for its strengthening

Fourth report prepared by Mr. Stanislav Chernichenko
and Mr. William Treat

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Introduction

1. In its resolution 1989/27 of 1 September 1989, the Sub-Commission decided to appoint two of its members as rapporteurs to prepare a report on existing international norms and standards pertaining to the right to a fair trial. The Sub-Commission also requested that the rapporteurs recommend which provisions guaranteeing the right to a fair trial should be made non-derogable.

2. On 7 March 1990, the Commission on Human Rights in its decision 1990/108 welcomed the decision of the Sub-Commission to appoint Mr. Stanislav Chernichenko and Mr. William Treat as rapporteurs to prepare a report on existing international norms and standards pertaining to the right to a fair trial and requested the Sub-Commission to consider the report, at its forty-second session, directly under agenda item 10 (d) entitled "Administration of justice and the human rights of detainees: the right to a fair trial".

3. The two members of the Sub-Commission submitted a brief preparatory report (E/CN.4/Sub.2/1990/34) to provide an overview of the subject and to indicate the areas where further study was needed. In their brief preparatory report they also made some general observations and set forth the principal treaties and other international human rights standards which provide the strongest protection for the right to a fair trial. Further, they discussed considerations relevant to making non-derogable the right to a fair trial. In addition, they recommended a more comprehensive study of the right to a fair trial and how that right might be strengthened.

4. In its resolution 1990/18 of 30 August 1990, the Sub-Commission recommended to the Commission on Human Rights and the Economic and Social Council that they endorse the decision to entrust Mr. Stanislav Chernichenko and Mr. William Treat with the preparation of a study entitled "The right to a fair trial: current recognition and measures necessary for its strengthening".

5. The Commission, in resolution 1991/43 of 5 March 1991 and the Economic and Social Council in its resolution 1991/28 endorsed that decision and requested the Special Rapporteurs to draft a questionnaire on the right to a fair trial.

6. The two Special Rapporteurs prepared their preliminary report (E/CN.4/Sub.2/1991/29) consisting principally of a summary of the interpretations of the right to a fair trial by the Human Rights Committee and also including a revised questionnaire relating to national practices in regard to the right to a fair trial.

7. In resolution 1991/14 of the Sub-Commission, resolution 1992/34 of the Commission, and decision 1992/230 of the Economic and Social Council, the two Special Rapporteurs were asked to continue their study of the right to a fair trial, it being anticipated that their progress report in 1992 would focus on interpretations of the right by international organizations, their progress report in 1993 would focus on national practices in regard to the right, and

that their final report in 1994 would make recommendations for strengthening the implementation of the right.

8. In August 1992 the two Special Rapporteurs submitted to the Sub-Commission a progress report on the right to a fair trial (E/CN.4/Sub.2/1992/24). That progress report had three addenda. Addendum 1 consisted of a study of the interpretations of international fair trial norms by the European Commission and Court of Human Rights. Addendum 2 evaluated the interpretations of international fair trial norms by the Inter-American Commission on and Court of Human Rights. Addendum 3 consisted of a study of the right to amparo, habeas corpus, and similar procedures.

9. In its resolution 1992/21 of 27 August 1992 the Sub-Commission requested the Special Rapporteurs to continue their study, but also asked Mr. Fisseha Yimer to serve as the principal commentator on the study without prejudice to the right of all Sub-Commission members to make comments and express their opinions. In its decision 1993/106 of 5 March 1993 the Commission endorsed the Sub-Commission's request and transmitted it to the Economic and Social Council for approval.

10. Chapter I of the present progress report summarizes the discussion of the preparatory, preliminary and progress reports. Chapter II identifies additional sources of international fair trial norms that have been identified since the progress report of May 1992. Chapter III summarizes in very general terms information on the diverse laws and practices related to the right to a fair trial in numerous countries. Chapter IV summarizes government responses to the fair trial questionnaire. Chapter V contains conclusions and recommendations. Annex I contains a supplemental bibliography of relevant material identified since the progress report of 1992. Annex II contains a draft third optional protocol to the International Covenant on Civil and Political Rights, aiming at guaranteeing under all circumstances the right to a fair trial and a remedy. Addendum 1 contains a draft declaration on the right to a fair trial and a remedy. Addendum 2 contains a summary of the information received by the Special Rapporteurs from non-governmental organizations concerning national laws and practices in regard to the right to a fair trial and a remedy. Further addenda may be issued to reflect information received from governments in regard to this progress report and particularly with regard to Addendum 2.

I. PREPARATORY, PRELIMINARY AND PROGRESS REPORTS: COMMENTS AND REVISIONS

11. The brief preparatory report (E/CN.4/Sub.2/1990/34) locked at the treaties and other instruments defining the attributes of the right to a fair trial which are the most protective of the right. For example, the brief preparatory report identified the principal treaties containing provisions on the right to a fair trial, including the International Covenant on Civil and Political Rights; the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment; the African Charter on Human and Peoples' Rights; the American Convention on Human Rights; the European Convention on Human Rights; the four Geneva Conventions for the Protection of Victims of War of 1949; and the two Additional Protocols of 1977 to the Geneva Conventions of 1949.

12. The brief preparatory report also discussed other instruments with provisions on the right to a fair trial: the Universal Declaration of Human Rights; the American Declaration of the Rights and Duties of Man; the Basic Principles on the Independence of the Judiciary; the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions; the Standard Minimum Rules for the Treatment of Prisoners; the Code of Conduct for Law Enforcement; the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; the Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"); Conclusion No. 44 of the Executive Committee of the United Nations High Commissioner for Refugees on the detention of refugees and asylum seekers; and the Concluding Document of the Vienna Follow-up Meeting of the Conference on Security and Cooperation in Europe.

13. Further, the preparatory report contained excerpts from the General Comments of the Human Rights Committee on articles of the International Covenant on Civil and Political Rights relevant to the right to a fair trial and a remedy.

14. The preliminary report noted the discussion of the brief preparatory report and several revisions to that report which will be made in the final report; identified new sources of international fair trial norms; principally summarized the interpretations of fair trial standards by the Human Rights Committee under the International Covenant on Civil and Political Rights; and contained a revised version of the preliminary questionnaire on national practices in regard to the right to a fair trial.

15. The preparatory and preliminary reports were discussed at the forty-second and forty-third sessions of the Sub-Commission and several useful comments were received. Sub-Commission members suggested that certain aspects of the right to a fair trial, for example, the right to petition for habeas corpus or amparo, should be made non-derogable even during periods of emergency. In this regard, the Sub-Commission, in its resolution 1991/15 of 28 August 1991 on habeas corpus, recommended to the Commission that it call on all States that had not yet done so "to establish a procedure such as habeas corpus by which anyone who is deprived of his or her liberty by arrest or detention shall be entitled to institute proceedings before a court, in order that the court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is found to be unlawful ... [and] to maintain the right to such a procedure at all times and under all circumstances, including during states of emergency".

16. In other respects the discussion at the Sub-Commission was reflected in the resolution adopted by the Sub-Commission recommending that the two Special Rapporteurs undertake a comprehensive study on the right to a fair trial.

17. One non-governmental organization submitted a written intervention (E/CN.4/Sub.2/1991/NGO/28) suggesting that the two rapporteurs should also consider fair trial and other procedures in administrative adjudication which may deal with refugees, administrative detention, rights of employees and similar matters.

18. During the Sub-Commission discussion of the preliminary report several members and representatives of non-governmental organizations presented information about practices in particular countries relating to the right to a fair trial, as well as the correlative issue of the independence of the judiciary and of practising lawyers. Among the countries discussed were the People's Republic of China (as well as information on Tibet), Colombia, Guatemala, India, Indonesia (focusing particularly on East Timor), the Islamic Republic of Iran, Japan, Kenya, the Republic of Korea, Kuwait, Myanmar, Nepal, Papua New Guinea, the Philippines, Turkey and the United States of America. The representatives of Colombia, Indonesia, Japan, Kenya, the Republic of Korea and Turkey provided further information or otherwise replied on these issues.

19. The comments also reflected the need for coordination in regard to recommendations arising from the studies on the right to a fair trial, states of emergency and the independence of the judiciary.

20. The two Special Rapporteurs welcomed the substantive comments and suggestions made by members and alternates of the Sub-Commission as well as by representatives of governments and non-governmental organizations.

21. The progress report of 1992 briefly summarized the preparatory and preliminary reports, reviewed comments made by members of the Sub-commission, and identified new sources of international fair trial norms. The addenda evaluated the interpretation of international fair trial norms by the European Commission and Court of Human Rights as well as the American Commission on and Court of Human Rights; studied the right to amparo, habeas corpus, and similar matters; briefly summarized the initial responses to the questionnaire made by 16 countries; and contained conclusions and recommendations for preparation of the progress report in 1993 and the final report in 1994, as well as ways to strengthen the right to a fair trial.

22. In introducing the progress report in 1992, Special Rapporteur Chernichenko underscored the spirit of cooperation which had reigned between him and Special Rapporteur Treat throughout their period of collaboration on the study. Mr. Treat said this spirit of cooperation was a triumph over the political and ideological rhetoric of the cold war years.

23. Sub-Commission members and participants engaged in a wide-ranging discussion on the right to a fair trial around the globe. On 27 August 1992, the Sub-Commission adopted resolution 1992/21 in which it expressed its appreciation to the Special Rapporteurs for their continued study of the right to a fair trial and requested Mr. Chernichenko and Mr. Treat to continue their study on the right to a fair trial. It also recalled that the "right to a fair trial applies to civil and penal procedures". Moreover, it urged the Special Rapporteurs to make suggestions on how the right to a fair trial might be further protected, notably by making the right, or certain aspects of the right, non-derogable, and incorporating basic fair trial guarantees into international standards. In addition, it invited Sub-Commission member Mr. Fisseha Yimer (Ethiopia) to serve as principal commentator for the study.

24. One non-governmental organization submitted a written intervention suggesting that the Sub-Commission request its Special Rapporteurs on the

administration of justice and the human rights of detainees to examine, in the light of the racial discrimination faced by African-Americans and Latinos in the United States criminal justice system as exemplified notably in the Los Angeles area, ways in which the administration of justice in the United States could be pursued in a non-discriminatory manner.

II. ADDITIONAL SOURCES OF FAIR TRIAL NORMS

25. The Commission on Human Rights in its resolution 1992/35 called upon all States which had not yet done so to establish a procedure such as habeas corpus by which anyone who is deprived of his or her liberty by arrest or detention shall be entitled to institute proceedings before a court so that the court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is found to be unlawful. The Commission also called upon all States to maintain the right to such a procedure at all times and under all circumstances, including during states of emergency.

26. The African Commission on Human and Peoples' Rights has adopted a resolution on the right to recourse procedure and fair trial which elaborates on article 7 (1) of the African Charter and guarantees several additional rights, including: notification of charges, appearance before a judicial officer, right to release pending trial, presumption of innocence, adequate preparation of the defence, speedy trial, examination of witnesses and the right to an interpreter (CHPR document ACHPR/COMM/FIN(XI)/Annex VII (9 March 1992)).

27. In August 1992, Mrs. Mary C. Bautista submitted to the Sub-Commission her final report on the application of international human rights standards to detained juveniles (E/CN.4/Sub.2/1992/20 and Add.1. In her report, Mrs. Bautista recommended that international agencies coordinate their efforts to improve the conditions of detained juveniles, that the feasibility of non-custodial measures be investigated wherever possible, that juvenile justice personnel be trained and that penal institutions separate detained juveniles from adults. A special meeting of representatives of United Nations bodies, specialized agencies, intergovernmental organizations and non-governmental organizations will take place at Geneva during 1993 to investigate whether juvenile justice standards promulgated by different agencies can be harmonized.

28. In August 1992, Mr. Louis Joinet submitted to the Sub-Commission his second report on the independence of the judiciary and the protection of practising lawyers (E/CN.4/Sub.2/1992/25 and Add.1). The report provided detailed information on measures and practices adopted by various countries which have either strengthened or weakened safeguards for judicial independence.

29. In August 1992, Mr. Leandro Despouy submitted to the Sub-Commission his fifth annual report on states of emergency (E/CN.4/Sub.2/1992/23). He reported that 61 countries were under a state of emergency in 1991. He also identified 80 countries which had declared states of emergency since 1985. The Sub-Commission asked Mr. Despouy to continue updating his report, as well as to continue his work on draft guidelines for the protection of rights

during states of emergency and, in particular, to examine the question of non-derogable rights.

30. Also in August 1992, the Sub-Commission's Working Group on Detention met and reported on developments concerning the human rights of persons subjected to detention or imprisonment, habeas corpus, the death penalty, juvenile justice and privatization of prisons.

31. In January 1993 the Commission's Working Group on Arbitrary Detention issued its second report (E/CN.4/1993/24), in which it rendered its first decisions in regard to communications which had been submitted. The Working Group considered several communications which stated that a person had been imprisoned without a trial or after a trial failing to comply with international fair trial standards. Accordingly, the Working Group determined whether procedures followed in particular cases violated international fair trial norms and could thus be considered to be "arbitrary" under its mandate.

32. The Working Group on Arbitrary Detention also commented on the practice of several countries in establishing special courts, including emergency courts, revolutionary courts, military courts, people's courts, or courts of State security. The Working Group observed:

> "Admittedly, courts of this kind do not seem to be strictly inconsistent with international rules. However, experience unfortunately proves (and the examples of many cases submitted to the Group shows) that in many States they are being used more and more, or even being established for the purpose, to try dissidents and opponents who are then denied any guarantee to the right to be heard by an independent and impartial tribunal. The Working Group therefore shares the Commission's concern, reflected in resolution 1992/31, about respect for the protection of all persons in the administration of justice, and it considers that the human right to be heard by an independent and impartial tribunal is the very essence of the human right to justice."

33. Furthermore, the Working Group on Arbitrary Detention recommended "strengthening the institution of habeas corpus". The Commission on Human Rights responded to this recommendation in its resolution 1993/36 of 5 March 1993, and encouraged States, in accordance with its resolution 1992/35 of 28 February 1992 to establish a procedure such as habeas corpus and maintain it in all circumstances, including during states of emergency.

34. On 22 February 1993 the Security Council adopted resolution 806 (1993) in which it decided to establish an international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia, and invited the Secretary-General in his report to the Security Council to propose the laws and procedures to be applied by the international tribunal.

35. On 3 May 1993 the Secretary-General issued a report (S/25704) proposing the establishment of an international tribunal as requested by the Security Council in resolution 808 (1993) and recommending a statute for the tribunal. On 25 May 1993 the Security Council adopted resolution 827 (1993)

in which it approved the report of the Secretary-General and established "an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia" between 1 January 1991 and a later date to be selected by the Security Council. Article 15 of the Statute of the International Tribunal authorizes the judges of the International Tribunal to "adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims, and witnesses and other matters". Article 20 of the Statute provides that the Trial Chambers of the International Tribunal "shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses". Articles 20 to 26 contain more specific provisions relating to the right to a fair trial, judgement, and appeal. In particular, most of the fair trial provisions in article 14 of the International Covenant on Civil and Political Rights are reproduced in article 21 of the Statute, although the Covenant is not mentioned as such.

III. NATIONAL PRACTICES RELATED TO THE RIGHT TO A FAIR TRIAL

36. This year the Special Rapporteurs have reached by far the most difficult step in the study, in which they have proposed to look at the laws on and interpretations given to the right to a fair trial in as many countries as possible. The Special Rapporteurs have recognized that it would be particularly important to study the laws of countries with different approaches to the right to a fair trial. Indeed, the Special Rapporteurs must consider both the civil law and common law countries with the many national variations which are found around the globe. For example, the Special Rapporteurs need to look particularly at countries whose legal systems are models for others in their regions or in countries where their legal traditions have been implanted.

37. In order to pursue this phase of the study the Special Rapporteurs have sought the assistance of governments, non-governmental organizations, bar associations and scholars throughout the world. The Special Rapporteurs were very grateful to the Governments of Australia, Austria, Bangladesh, Belarus, Bolivia, Brazil, Canada, Chad, Cuba, Finland, Iraq, Ireland, Japan, Mexico, Monaco, Myanmar, New Zealand, Norway, Panama, Papua New Guinea, the Philippines, Qatar, Rwanda, Sudan, Sweden, Turkey, Uruguay and Yugoslavia for providing responses to the questionnaire contained in Annex II to the preliminary report on the right to a fair trial (E/CN.4/Sub.2/1991/29). As discussed more fully in chapter IV below, many of the governments provided detailed information and copies of relevant legislation.

38. The Special Rapporteurs also very much appreciated the information they received from specialized agencies and intergovernmental organizations, including the Council of Europe, the General Agreement on Tariffs and Trade, the United Nations Educational, Scientific and Cultural Organization (UNESCO), the World Bank, and the World Health Organization. In addition, the Special Rapporteurs were able to review information from the African Commission on Human and Peoples' Rights as well as the Inter-American Commission on and Court of Human Rights.

39. The Special Rapporteurs were also able to consult reports submitted by States Parties to the International Covenant on Civil and Political Rights, as well as records of the consideration of those reports by the Human Rights Committee. Additional information came from similar reports submitted by States Parties to the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women.

40. The Special Rapporteurs received considerable assistance from the International Committee of the Red Cross, which submitted an explication of the judicial guarantees afforded by humanitarian law, as well as two helpful memoranda.

41. The Special Rapporteurs were also pleased to receive extensive information from the American Bar Association; Amnesty International; Andean Commission of Jurists; British Irish Rights Watch; Committee on the Administration of Justice; Czech Bar Association; International Association of Lawyers; International Centre of Sociological, Penal and Penitentiary Research and Studies; International Federation Terre des Hommes; Inter-Parliamentary Union; International Union of Magistrates; Japan Federation of Bar Associations; Korean Bar Association; Lawasia; Minnesota Advocates for Human Rights; Regional Council on Human Rights in Asia; and University of Minnesota Human Rights Center.

42. The Special Rapporteurs also received information from an individual whose son is imprisoned in Northern Ireland and another individual who states that he failed to receive a fair trial in Dublin, Ireland.

43. This study of the right to a fair trial throughout the world examines both the provisions and codes relating to the trial process, as well as their application in practice. The primary sources used to study relevant legal provisions consisted of a country's constitution, criminal procedure code, and other laws. The Special Rapporteurs also utilized non-governmental organization reports in addition to the government responses to the Rapporteurs' questionnaire, in order to provide an overview of the application of the legal provisions.

44. For the purposes of this study, the Special Rapporteurs conceived the right to a fair trial broadly. Accordingly, they considered not only legal provisions, but also the way those provisions are actually applied or not applied. Indeed, some of the most significant attributes of the right to a fair trial are not specified in laws and procedural rules, but may be discovered only from a very intensive country-by-country review of the customs and practices of the judges, lawyers, investigators and others involved in the trial process.

45. Further, the study sought to evaluate not only proceedings in court, but also pre-trial procedures which can affect the overall process. For example, a detainee's ability to consult a lawyer, ability to undertake an investigation and other aspects of the pre-trial process have a significant impact on the fairness of the criminal trial.

46. In seeking to study laws and practices with respect to trials and related procedures, the Special Rapporteurs were not only confronted by the sheer magnitude of material they collected, but also with frequent changes in the relevant laws and practices. Indeed, the world is changing so rapidly that the Special Rapporteurs collected information about several countries that no longer have the same governmental structure or no longer exist in the same form. To alleviate this problem, the Special Rapporteurs specified, where possible, the date of the material used in the report, particularly for the information received from non-governmental organizations in Addendum 2 to this progress report.

47. Another difficulty in comparing national systems in particular stages of the trial process is the possibility that relative shortcomings in one area can be compensated by laws and practices in another area which safeguard the rights of the parties.

48. Given the broad nature of this study, in terms of both scope of subject matter and the large number of countries studied, this report is neither comprehensive nor rigorously comparative. A truly exhaustive study of the right to a fair trial would require encyclopaedic information and would take more than a lifetime. Indeed, because of the continual changes, such a study could never be completed. The somewhat more realistic objective of this study is to highlight common characteristics and some variations in trial procedures with the aim of identifying principles which should largely be consistent with national practices and thus acceptable to Governments.

49. The Special Rapporteurs have been able to make use of the substantial material they have collected as a basis for the draft declaration on the right to a fair trial and a remedy, which is reproduced in Addendum 1 to the present progress report. From their study of national laws and practices, the Special Rapporteurs have recognized the need for a draft third optional protocol to the International Covenant on Civil and Political Rights, aiming at guaranteeing under all circumstances the right to a fair trial and a remedy. The draft third optional protocol is reproduced in Annex II to the present progress report.

50. Since most of the information gathered by the Special Rapporteurs related to criminal trials, the study focuses principally, but not exclusively, on trial procedures in such cases. The Special Rapporteurs have been able to gather sufficient material to provide a basis for drafting a declaration relating to all aspects of the right to a fair trial and a remedy, including administrative, civil and criminal proceedings. None the less, the Special Rapporteurs recommend that further study of administrative, civil and other procedures should be undertaken. The massive nature of the material already collected by the Special Rapporteurs, however, indicates that such additional study should be separately considered by the Sub-Commission.

51. The Special Rapporteurs have sought in Addendum 2 to this report to summarize in general terms the information received principally from non-governmental organizations and bar associations concerning laws and practices relating to the fairness of trials. The Special Rapporteurs lacked the capacity to assess the veracity of the materials they received. Such an assessment would necessitate far more information and contextual investigation

than were possible given the available time and resources. The Special Rapporteurs have, however, sought to reflect in Addendum 2 the information they have already received from those Governments that responded to the questionnaire.

52. Further, the Special Rapporteurs noted that the materials received from Governments, non-governmental organizations, and bar associations reflect only an incomplete sample of countries. Indeed, the Special Rapporteurs collected information on trial practices in 65 of the 183 countries that are Members of the United Nations. Further, the Special Rapporteurs found that they could not provide more than a small reflection of trial practices in the 65 countries. A more detailed description of trial practices in any one country, much less 65 or 183, would have required far more time, resources, and space in this report than were available.

53. None the less, the Special Rapporteurs believe the non-governmental and bar association materials should be summarized because they probably reflect the diverse problems arising around the world with respect to the implementation of the right to a fair trial and a remedy. Since the material could not be verified, the Special Rapporteurs have transmitted a preliminary version of the summaries contained in Addendum 2 to the Governments concerned and have asked for comments from those Governments. The Special Rapporteurs have indicated that they would be pleased to revise the summaries or otherwise reflect any comments received from Governments. If government comments are not received in time to be reflected in Addendum 2, the Special Rapporteurs would be pleased to reflect the comments in further addenda to this progress report or in the final report.

54. The Special Rapporteurs have drawn from the materials several general observations about common elements and diverse approaches to the right to a fair trial and the inextricably related right to a remedy. Those general observations pertain to various aspects of the right to a fair trial, including treatment during detention prior to and during trial, notice, counsel, hearing, composition of the court, decision, sentencing and punishment, appeal or other review in higher courts, pardon, other remedies and procedures for juveniles. The following information is organized according to the questions contained in the revised questionnaire on the right to a fair trial which was distributed to Governments. The questionnaire is annexed to the preliminary fair trial report (E/CN.4/Sub.2/1991/29).

A. Treatment during detention prior to and during trial

55. The Special Rapporteurs received information about a wide range of procedures and conditions related to pre-trial detention - particularly as they may have a significant impact upon the fairness of trial proceedings. The Rapporteurs received information on the accused's protection from torture or other ill-treatment as well as protection from coerced confessions and self-incriminating statements. They received information indicating that numerous States have Constitutions guaranteeing the right to be free from torture and other inhuman treatment. Constitutional safeguards are often supplemented by mechanisms which punish the government official who orders or commits the torture. Despite explicit prohibitions on torture, however, pre-trial detainees are still often ill treated. Torture, other forms of

violence and threats are used to extract confessions from the accused around the world. Countries have adopted mechanisms other than penal laws to stem both torture and the use of confessions gained through torture in criminal trials. Numerous countries deem confessions extracted under torture and other forms of duress inadmissible in criminal trials. Several countries recognize the accused's right to remain silent either in their Constitutions or in their criminal procedure codes.

56. Further, the Rapporteurs examined the remedies, such as habeas corpus and amparo, available for detainees seeking to challenge the lawfulness of their arrest, their conditions of pre-trial detention or the failure to provide fair procedures prior to trial. Habeas corpus is recognized in several States. In practice, however, habeas corpus does not always effectively protect detainees. For example, police authorities do not always comply with judicial decisions which order the release of individuals who have been unlawfully arrested. Non-compliance with the rule of law is especially pronounced in times of national emergency or insurgency.

57. There does not appear to be a universal norm as to the appropriateness of pre-trial detention. Several States have provisions which reduce detention pending trial. Some States provide the accused person with the ability to initiate court proceedings to challenge the conditions of pre-trial detention or the failure to provide fair procedures prior to trial.

B. Notice

58. In cases not involving administrative detention, the length of time a person can be detained without being charged for a criminal offence or without having his or her case submitted before a court varies widely throughout the world. The time period usually ranges between 24 hours and seven days from the time of arrest. A State's regular notice requirement, in contrast, is frequently not followed in cases of administrative detention and other procedures justified by emergency conditions and other exigent national security measures.

C. Right to Counsel

59. The Special Rapporteurs received information about the right of accused persons to retained counsel, as well as the right to appointed counsel for accused persons who are indigent. The Rapporteurs received materials relating to the right to counsel, and in particular, the ability of lawyers to consult with their clients during pre-trial detention. Accused persons in many countries are unable to consult with counsel during pre-trial detention, particularly in cases where political and national security concerns are implicated. The Special Rapporteurs also received materials documenting instances where the right to effective counsel had been abridged. There are situations where the level of competence of appointed counsel falls far below the quality of counsel a private lawyer would afford.

60. The Special Rapporteurs received information that several countries provide appointed counsel for indigent accused. Some countries only appoint counsel for persons charged with serious offences. The remuneration of

appointed counsel varies throughout the world, but is often substantially less than fees charged for private practice.

D. Hearing

61. Several countries have established specific time limitations to prevent accused persons from being tried after undue delay. For example, one country permits judges to dismiss criminal charges when the trial has not commenced within one year of detention. Other countries safeguard the right to be tried without undue delay by constitutional provisions. None the less, delays are very common throughout the world because judicial resources are overburdened by a large volume of criminal cases. The practice of administrative detention in several countries often conflicts with the right to be tried without undue delay. Indeed, the Rapporteurs received several reports which indicated that administrative detainees had been held for several years without ever receiving a judicial hearing.

62. Many countries have provisions which require that trials be made open to the public. Some countries invest trial judges with the discretion to prohibit public attendance.

63. Several countries permit trials in absentia in circumstances where the accused person is not present within the country.

64. Governments generally provide an interpreter when the accused does not understand the language of the court.

65. Numerous States require the prosecution to establish guilt beyond a reasonable doubt or by an intimate conviction of the decision maker. Many States also follow the principle that an accused person is innocent until proved guilty.

E. Composition of the court

66. The personal independence of judges is guaranteed in the Constitutions and laws of numerous countries. The independence and impartiality of judges are protected in a variety of ways, but most common are constitutional provisions securing the tenure of judges for fixed terms or for their lifetime. In times of public emergency or national security crises, however, judicial independence is frequently jeopardized.

67. There is a considerable diversity among countries in regard to the use of juries or lay assessors when adjudicating criminal and civil cases. Countries impose different qualifications for selecting jurors and lay assessors.

F. Decision, sentencing and punishment

68. Numerous countries require a court to substantiate their decisions relating to convictions and sentencing. Many countries prohibit trying an individual for the same offence twice. In addition, most countries prohibit the use of ex post facto laws to charge and convict individuals of a criminal offence. Many countries buttress the right not to be tried under

ex post facto laws with provisions which limit the application of amended penal laws.

69. A number of countries maintain the death penalty and the existence of the death penalty renders far more serious any defects in the fairness of trial procedures. The offences which carry the death penalty vary between countries. Despite laws permitting the imposition of the death penalty, several countries have not executed a convicted criminal for many years. Even countries which still have the death penalty do not generally execute juveniles, mentally incapacitated persons or pregnant women.

G. Appeal or other review in higher courts

70. Several countries have provisions which direct the higher courts to review, as a matter of course, convictions carrying heavy penalties. In several countries the right to appeal is restricted to serious offences and heavy penalties. The right to appeal criminal convictions and sentences is sometimes abridged during times of national emergency or governmental instability. The right to appeal is sometimes eliminated or restricted for persons convicted of offences of a political nature or relating to national security.

71. Several countries require convicted persons to file a notice of appeal or appeal within a short period following sentencing. Several countries confer on appellate courts broad power to review a lower court's decision on errors of law and fact. Some countries restrict the ability to appeal civil judgements. The ability to appeal interlocutory judgements is not recognized in some countries, or in others is difficult to obtain.

H. Pardon

72. Several countries provide extra-judicial procedures for pardoning persons convicted of a crime. The special procedures for seeking pardon or clemency from a death sentence vary around the world. The power to pardon individuals generally resides in the office of the president or head of State. In some countries, the power to pardon is shared by other high governmental officials.

I. Other remedies

73. The remedies available to persons who have been detained illegally or who have been subjected to ill-treatment preceding trial are discussed in Section A above. The principal remedies discussed there are mechanisms such as habeas corpus, amparo, and penal laws holding officials accountable for the ill-treatment of detainees. There are, however, other remedies available to persons subject to human rights violations. For example, human rights victims can receive compensation for injuries suffered through civil lawsuits against the responsible authorities.

74. In some countries habeas corpus is restricted in times of national emergency or when invoked by political dissidents. Several countries provide recourse for persons wrongly convicted or detained.

J. Procedures for juveniles

75. The Special Rapporteurs did not receive a significant body of materials on the procedures and national practices relating to the treatment of accused juveniles. The necessity for special procedures and protection for juveniles is already reflected in international standards. In 1985 the General Assembly adopted without a vote the United Nations Minimum Rules for the Administration of Juvenile Justice. For a discussion on the application of international standards relating to juveniles in various national criminal justice systems, see the report prepared by Mrs. Mary C. Bautista which was submitted to the Sub-Commission at its forty-fourth session (E/CN.4/Sub.2/1992/20 and Add.1).

IV. SUMMARIES OF GOVERNMENT RESPONSES TO QUESTIONNAIRE

76. The Special Rapporteurs were very grateful to the 28 Governments which responded to the questionnaire contained in Annex II to the preliminary report on the right to a fair trial (E/CN.4/Sub.2/1991/29) and thus provided useful information for the study.

77. Many of the Governments provided detailed information and copies of relevant legislation. In this regard the Special Rapporteurs would like particularly to thank the Governments of Australia, Austria, Belarus, Bolivia, Canada, Chad, Cuba, Finland, Iraq, Japan, Mexico, Myanmar, New Zealand, Norway, the Philippines, Rwanda, Sweden, Turkey, Uruguay and Yugoslavia for providing comprehensive responses to the questionnaire. In addition, the Special Rapporteurs appreciated receiving copies of legislation and other materials from Monaco.

78. A number of government responses to the questionnaire contained statements which indicated the principles underlying their respective legal institutions. The Rapporteurs found these policy statements to be useful for elaborating a draft declaration on the fundamental right of all persons to a fair trial and remedy.

79. The Rapporteurs would like to thank the Government of Australia for its comprehensive response to the questionnaire, a 43-page response with a 5-page appendix submitted on 10 April 1992. The Government of Australia included some preliminary remarks about the constitutional and legal structure of Australia in its reply:

> "The Commonwealth of Australia is a federation consisting of six States and two self-governing Territories ... The federal and State Constitutions do not contain guarantees of such matters as 'due process' as are provided, for example, in the US Constitution. Australian criminal law and procedure, however, is substantially derived from the common law of England, to which the concepts of justice and a fair trial are fundamental ... The fundamental concepts of justice and a fair trial inherited from English common law are retained in all jurisdictions.
>
> ...

> "All rules and practices regarding the custody and treatment of persons in detention, including their interrogation, where applicable, are subject to ongoing internal review in all Australian jurisdictions. Review is carried out routinely by administrative authorities responsible for the development and maintenance of the various rules, regulations and standing orders which govern the custody and treatment of persons in detention ... In addition, the administrative bodies established in each jurisdiction to investigate complaints about police or correctional officers have the function of reviewing the rules relevant to the conduct giving rise to a complaint."

80. The Rapporteurs would like to thank the Government of Austria for its precise response to the questionnaire. The Government of Austria, on 29 October 1991, submitted an 11-page response to the questionnaire including citations to the Austrian Code of Criminal Procedure, the Austrian Penal Code, the Austrian Juvenile Courts Act and the Austrian Federal Constitution, as well as useful citations to secondary literature on Austrian criminal law.

81. The Rapporteurs would like to thank the Government of Belarus for its thorough response to the questionnaire. On 15 August 1991, the Government of Belarus submitted a 15-page detailed response summarizing the current state of its laws. The Government of Belarus pointed out that each of its citizens has a right to an impartial trial under its Constitution, criminal procedure, civil procedure and in its administrative laws. As stated in Article 155 of the Constitution, "Justice in [Belarus] is founded on the equality of its citizenry before its laws and courts". The Rapporteurs were also pleased by the inclusion of a short bibliography of the work of various commentators on the right to an impartial trial.

82. The Rapporteurs would like to thank the Government of Bolivia for its precise response to the questionnaire. The Government of Bolivia, on 3 September 1991, submitted a 17-page detailed response to the questionnaire, as well as the Bolivian Penal Code, the Bolivian Civil Code, and the Bolivian Special and Administrative Code.

83. The Rapporteurs would like to thank the Government of Canada for its complete response to the questionnaire. The Government of Canada, on 1 September 1992, submitted a 49-page response to the questionnaire, as well as copies of relevant portions of the Canadian Criminal Code, the entire Canada Evidence Act, the National Defense Act, the Military Rules of Evidence, and the Canadian Charter of Rights and Freedoms. The Rapporteurs found particularly useful the Government's observations on the office of ombudsman in the provinces:

> "[T]he majority of provinces in Canada have appointed an ombudsman or an equivalent thereof whose mandate includes conducting investigations on his or her own initiative or on complaint from or on behalf of persons concerning problems relating to their confinement in provincial detention facilities. As an officer of the legislature, the ombudsman reports to the Assembly upon the problems investigated and the action taken by the government

> authorities responsible for detention facilities within the province."

84. The Rapporteurs would like to thank the Government of Chad for its comprehensive response of 11 pages to the questionnaire. The response was dated 20 August 1991. The Rapporteurs were particularly interested in the candid response of the Government of Chad with regard to the portion of the questionnaire regarding the right to counsel. In Chad, indigent defendants have the right to be assigned an attorney from a list kept by the Bar Association. These lawyers "offer their services not for the lure of financial gain, because of the need for legal defence", since the amount of renumeration is modest when compared to their regular rates. None the less, the Government of Chad opined that "an attorney chosen and well compensated is more motivated to defend his client well at all steps of the process than one chosen by the court".

85. The Rapporteurs would like to thank the Government of Cuba for its comprehensive response to the questionnaire. The Government of Cuba, on 24 February 1992, submitted a precisely drafted 15-page response to the questionnaire. With regard to Cuban civil procedure, the reply referred the Rapporteurs to the laws which ensured the rights of Cuban citizens to a fair trial. The response of the Cuban Government continued with answers to each question contained in the questionnaire, including references to the relevant laws.

86. The Rapporteurs would like to thank the Government of Finland for its detailed 16-page response to the questionnaire, submicted on 7 May 1992. In its conclusion, the Government of Finland explained:

> "Finnish law is currently undergoing an extensive reform process in respect [to] tribunals and judicial procedure. Courts of lower instance have been made uniform and procedure in civil matters shall be governed by new laws entering into force on 1 December 1993. The newly uniform lower courts are for civil matters [and] are composed of a presiding judge and generally three lay members. The reform of judicial procedure in criminal matters is still being worked on [by] the Ministry of Justice. In this context it has been proposed [inter alia] that provisions be included on public defence of the defendant, that the rules on application for a summons be stricter and that appropriate preparatory measures be taken to enable an oral hearing to be conducted in criminal matters without delay or multiple postponements. Appealing the ruling of the lower court in an appellate court and the procedure relative thereto are currently under consideration in a committee established by the Ministry of Justice. The proposal has been made there, too, that oral hearings be obligatory. Furthermore, restrictions are being considered on the right to appeal."

87. The Rapporteurs would like to thank the Government of Iraq for its precise response to the questionnaire. The Republic of Iraq submitted a 15-page detailed response to the questionnaire along with the Iraqi Code of Civil Procedure, the Iraqi Law of Evidence and the Iraqi Code of Criminal

Procedure. The Government of Iraq, in a description of its Code of Criminal Procedure pronounced:

> "Iraqi criminal procedure, being basically derived from the Anglo-Saxon system, contains procedural rules governing the institution of criminal proceedings, as well as investigations and examinations by examining magistrates rather than public prosecutors. The Code regulates trial procedures, including the delivery, review and execution of judgements, and also contains provisions concerning release on probation and the extradition of accused persons and criminals. In general, the Iraqi rules of criminal procedure guarantee every citizen's right to seek legal redress and appear in court."

88. The Rapporteurs would like to thank the Government of Japan for its thorough response to the questionnaire. The Government of Japan, on 15 April 1992, submitted a 20-page specific response to the questionnaire. The detailed nature of the submission is indicated by the following example from the response of the Government of Japan to the portion of the questionnaire relating to appeals:

> "The Code of Criminal Procedure provides for kokoku-appeal, immediate kokoku-appeal and special kokoku-appeal as means of appeal against the interlocutory judgement pronounced prior to the final judgement.
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> "Kokoku-appeal is the means of appeal against a ruling rendered by a court to other cases than where it is specially provided that an immediate kokoku-appeal may be taken. Kokoku-appeal, however, may not be made against a decision concerning the jurisdiction of a court or proceedings which [take place] prior to judgement except with regard to [a] ruling relating to detention, release on bail, [or] seizure or restoration of articles seized ...
>
> "Immediate kokoku-appeal is the means of complaint which is independently in progress if a criminal proceeding is obstructed or the human rights of the parties concerned are seriously affected ...
>
> "Special kokoku-appeal is the means of complaint which is specially allowed for submission to the Supreme Court on the grounds of the violation of the Constitution or the contradiction of precedents even when kokoku-appeal or immediate kokoku-appeal is not allowed."

89. The Rapporteurs would like to thank the Government of Mexico for its detailed response to the questionnaire. The Government of Mexico, on 15 July 1991, submitted a comprehensive 56-page response to the questionnaire. The introductory remarks of the Government of Mexico placed the Mexican judicial system in historical context. The Government of Mexico observed that the Constitution recognizes and guarantees to all persons the right to a fair trial.

90. The Rapporteurs would like to thank the Government of Myanmar for its precise response to the questionnaire. The Government of Myanmar, on 19 September 1991, submitted a detailed 10-page response to the questionnaire along with the Civil Procedure Code, the Criminal Procedure Code, the Military Court Procedure and the Administrative Code Procedure, of Myanmar. The preliminary remarks contained in the reply of the Government of Myanmar stated:

> "A fair trial in public hearing by competent, independent and impartial tribunal is a birth-right of every person both in civil and criminal matters. Fairness of trials depends solely on procedures laid down.
>
> "We, in Myanmar have both civil and criminal procedures to give a fair trial to all persons. For civil matters the Civil Procedure Code and for criminal matters the Criminal Procedure Code are promulgated. Defence Services Act is promulgated for military persons and other administrative laws are promulgated for workers and employers alike."

In its conclusion the Government of Myanmar stated:

> "[t]he administration of justice in Myanmar is based on, namely: (1) independence of [the] judiciary; (2) safeguarding and protecting the interest of the people; (3) educating people to become law abiding; (4) dispensing of justice in open court unless otherwise prohibited by law; [and] (5) guaranteeing the right of defence and the right of appeal in all judicial cases."

91. The Rapporteurs would like to thank the Government of New Zealand for its thorough response to the questionnaire. The Government of New Zealand presented a 10-page, concise response to the questionnaire. The reply of the Government of New Zealand not only contained a list of statutes, rules and regulations pertinent to the current study, but also included a bibliography of texts, articles and references which the Rapporteurs found especially useful.

92. The Rapporteurs would like to thank the Government of Norway for responding to the questionnaire. The response of the Government of Norway included, inter alia, a 5-page response to the questionnaire as well as the Criminal Procedures Act of 22 May 1981 and the Act of 10 February 1967 relating to Procedure in Cases Concerning the Public Administration. The reply also contained Norway's initial and second periodical reports under Article 40 of the Covenant on Civil and Political Rights, relating to the right to a fair trial.

93. The Rapporteurs would like to thank the Government of the Philippines for its comprehensive response to the questionnaire. The Government of the Philippines, on 8 July 1991, provided a 44-page response to the questionnaire, which contained all the constitutional provisions and the Rules of Civil, Criminal, Administrative, Military Court and Emergency Procedure which were

relevant to the questionnaire. The reply also contained a preliminary statement by the Chair of the Philippine Commission on Human Rights, which explained:

> "As an agency with the primary task of carrying out the State policy on human rights ... the Commission on Human rights will show in this paper the Philippine standard of fair trial. While one might say that what is to be presented is not a perfect system, it would tend to show, however, that legal remedies are available to the full exercise of one's rights and the protection thereof. In the same vein, this paper hopes to present the information requested in the questionnaire.
>
> ...
>
> "[The paper discusses] the basic constitutional requirement on why these rules have been promulgated, which ... is the pivotal issue in enhancing the right[s] of a person in the Philippine justice system."

94. The Rapporteurs would like to thank the Government of Rwanda for its thorough response of 19 May 1992 to the questionnaire. The 12-page response provided detailed answers, including citations of the relevant portions of the Constitution of Rwanda, the civil procedure code, or the criminal procedure code.

95. The Rapporteurs would like to thank the Government of Sweden for its complete response to the questionnaire. The Government of Sweden submitted a 21-page precise response to the questionnaire. The reply of the Government of Sweden described the Swedish criminal procedure system as:

> "based on the rule that the accused person shall be regarded as innocent until his guilt has been proven. The prosecutor has the burden of proof with regard to all relevant circumstances. The judgement may only be based on what has occurred during the main hearing."

96. The Rapporteurs would like to thank the Government of Turkey for its precise response to the questionnaire. The Government of Turkey, on 13 February 1992, submitted a 9-page response to the questionnaire. The Government of Turkey included some preliminary remarks about the constitutional and legal structure of Turkey in its reply:

> "Article 2 of the Turkish Constitution describes the characteristics of the Republic as a 'democratic, secular, and social State governed by the rule of law, in accordance with the concepts of social peace, national solidarity, and justice; respectful of human rights, committed to Ataturk nationalism, and based on the fundamental principles set forth in the preamble'. Thus the principle of the rule of law has been given a prominent place in the Constitution together with other fundamental characteristics of the Turkish State."

97. The Rapporteurs would like to thank the Government of Uruguay for its detailed response to the questionnaire. The Government of Uruguay provided a 17-page comprehensive response to the questionnaire. In replying to the questionnaire, the Government of Uruguay stressed that "preference has been given to providing a comprehensive rather than an analytical reply, since, as is to be expected from a questionnaire which aims to cover such a wide variety of legal systems, various items in the questionnaire are repetitive or interrelated". For example, in its answers regarding the right to counsel the Government of Uruguay stated:

> "[I]n Uruguayan positive law, the defence is not only a right of the accused, but a legal requirement which he may not waive. The object is to establish equality in the trial, through the institution of the defending counsel: to match the professional legal experts of the prosecution with another legal specialist, who will endeavour to obtain the accused's acquittal or to demonstrate the existence of extenuating circumstances in order to reduce the penalty sought."

98. The Rapporteurs would like to thank the Government of Yugoslavia for its comprehensive response to the questionnaire. The Government of Yugoslavia, on 31 January 1992, provided a detailed and thorough 40-page response to the questionnaire. The reply described the governing tenet of Yugoslavian civil law as follows:

> "One of the main principles governing a civil suit is the principle of material truth whereunder the court is to establish the complete and full truth regarding the disputable facts on which the grounds of the claim depend. In doing so, the court is not limited by the evidence proposed by the parties which found their claims thereon, but is authorized to seek additional evidence of relevance for passing judgement.
>
> ...
>
> "The principle of material truth is related to the principle of impartial assessment of evidence whereunder the court decides, at its discretion, which facts are to be taken as proven, on the basis of a fair and careful appraisal of every piece of evidence individually and of all evidence together, as well as of the outcome of the whole procedure."

V. CONCLUSIONS AND RECOMMENDATIONS

99. The Special Rapporteurs have reviewed the treaties and other international instruments protecting the right to a fair trial. They have studied the interpretations of the right to a fair trial by the Human Rights Committee, the African Commission on Human and Peoples' Rights, the European Commission and Court of Human Rights, and the Inter-American Commission on and Court of Human Rights. They have also prepared a study of the right to habeas corpus, amparo and similar procedures.

100. The Special Rapporteurs have gathered materials about national Constitutions, laws, rules, and practices relating to the right to a fair trial from more than 65 countries. In this regard, they have very much appreciated the information they have received from 28 Governments, as well as intergovernmental organizations, non-governmental organizations, bar associations and individuals.

101. The Special Rapporteurs have found that several of the States studied appear to operate dual systems of trial procedures. Some States deviated from standard procedures in emergency situations which threaten national security or when the offence is political in nature. In some States, jurisdiction is lodged in special or military courts, while in others regular criminal courts try the cases but with remarkable deviation from the State's fair trial norms. While these problems do not exist in many countries, the problems indicate the need for greater international protection for the right to a fair trial and a remedy - particularly during periods of public emergency.

102. In order to provide greater protection to the right to a fair trial and a remedy during periods of public emergency, the Special Rapporteurs recommend the development of a third optional protocol to the International Covenant on Civil and Political Rights, aiming at guaranteeing under all circumstances the right to a fair trial and a remedy. The Special Rapporteurs have prepared a preliminary draft of such a third optional protocol, which is contained in Annex 2 to this progress report.

103. The draft third optional protocol makes non-derogable in periods of public emergency both the right to a fair trial and the right to a remedy. The Special Rapporteurs recommend that the right to a fair trial and the right to a remedy be included in the third optional protocol, because these two rights are very much related. The Commission on Human Rights and the Sub-Commission have during the past two years reiterated their view that the right to habeas corpus or similar procedures should be made non-derogable and thus should be applicable even during periods of public emergency. The International Covenant on Civil and Political Rights does not specifically guarantee the right to habeas corpus or amparo, because those precise procedures are not available in some countries. None the less, the Covenant in articles 9 (3) and 9 (4) provides the essential remedy for violations of human rights available through habeas corpus, amparo, or similar procedures in many countries. Accordingly, the Special Rapporteurs recommend that the draft third optional protocol make non-derogable not only the right to a fair trial guaranteed by article 14 of the Covenant, but also articles 9 (3) and 9 (4).

104. In its resolution 1992/21 of 27 August 1992 the Sub-Commission anticipated the preparation by the Special Rapporteurs of their final report in 1994 containing recommendations for strengthening the implementation of the right to a fair trial in the light of interpretations of the right by international bodies and contemporary national practices. The Special Rapporteurs expect to prepare their final report for submission to the Sub-Commission at its forty-sixth session in 1994. The Special Rapporteurs have, however, prepared a preliminary draft of the third optional protocol which is annexed to the present progress report in 1993 in the hope that the Sub-Commission, Governments and non-governmental organizations may wish to

review the draft carefully in preparation for further consideration at the forty-sixth session.

105. The Special Rapporteurs recommend that this progress report, including particularly the third optional protocol in Annex II, be sent to all Governments and non-governmental organizations for their comments, so that their comments can be considered by the Sub-Commission at its forty-sixth session.

106. In their final report, the Special Rapporteurs will make additional recommendations for strengthening the implementation of the right to a fair trial and a remedy. The Special Rapporteurs anticipate that they will formulate recommendations to Governments and international organizations as to how they should strengthen the concrete implementation of the right to a fair trial and a remedy.

107. In anticipation of the formulation of their final recommendations, the Special Rapporteurs have also sought to derive from international interpretations of the right to a fair trial and a remedy, as well as from national laws and practices, those common elements which might serve as the basis for a draft declaration on the right to a fair trial and a remedy. In preparation for discussion at future sessions of the Sub-Commission, the Special Rapporteurs have prepared a preliminary draft of a declaration on the right to a fair trial and a remedy, which is contained in Addendum 1 to the present progress report. In this regard the Special Rapporteurs and the Sub-Commission should endeavour to assure that the present fair trial standards are not weakened in the process of elaborating upon and delineating the draft declaration.

108. The Special Rapporteurs are encouraged by the efforts of the Working Group on Arbitrary Detention, which rendered its first decisions in the past year in regard to communications which had been submitted. The Working Group considered several communications which stated that a person had been imprisoned without a trial or after a trial failing to comply with international fair trial standards. Accordingly, the Working Group determined whether procedures followed in particular cases violated international norms with respect to the right to a fair trial and could thus be considered to be "arbitrary" under its mandate. The Special Rapporteurs believe that the Working Group on Arbitrary Detention possesses great potential for implementing the right to a fair trial and a remedy in specific cases.

109. The Working Group on Arbitrary Detention can determine in an expeditious manner whether individuals have been afforded their right to a fair trial and a remedy in the context of administrative detention or criminal prosecution. The Working Group cannot, however, respond to problems of unfair trials in cases which do not result in detention. None the less, the Working Group can respond more promptly to cases of arbitrary detention and thus can supplement the work of the Human Rights Committee, the Inter-American Commission on and Court of Human Rights, the European Commission and Court of Human Rights, and eventually the African Commission on Human and Peoples' Rights. Those latter institutions may consider all fair trial issues - whether civil, criminal, military or administrative - but only in regard to Governments that have ratified their authorizing treaties and instruments. In that regard, the

Working Group on Arbitrary Detention can respond effectively to violations in all countries of the world.

110. Since most of the information gathered by the Special Rapporteurs related to criminal trials, the study focuses principally, but not exclusively, on trial procedures in such cases. The Special Rapporteurs have been able to gather sufficient material to provide a basis for drafting a declaration relating to all aspects of the right to a fair trial and a remedy, including administrative, civil and criminal proceedings. None the less, the Special Rapporteurs recommend that further study of administrative, civil, and other procedures should be undertaken. The massive nature of the material already collected by the Special Rapporteurs, however, indicates that such additional study should be separately considered by the Sub-Commission.

111. Before concluding this progress report, the Special Rapporteurs believe they are constrained to note the relevance their study may have to the establishment of the International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia. The Security Council in its resolution 827 (1993) established such a tribunal. The International Tribunal will need to assure at least the procedural safeguards afforded by the International Covenant on Civil and Political Rights and the other international instruments discussed in this study. The International Tribunal should also be permitted to apply other aspects of human rights law, as well as humanitarian law.

112. In conclusion, the two Special Rapporteurs note that the task they have undertaken covers a vast and complex subject. The right to a fair trial and a remedy has a greater importance today than it had when the Special Rapporteurs began their work. Many Governments are taking a fresh look at how they can develop institutions which will provide enduring protection for human rights. Governments recognize that judicial and administrative structures which will guarantee the right to a fair trial and a remedy are indispensable for the protection of all other human rights. The Special Rapporteurs wish to express their appreciation of the cooperation and assistance they have received from Governments, the Centre for Human Rights, non-governmental organizations and from the many others who have assisted with this study.

Annex I

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Annex II

DRAFT THIRD OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, AIMING AT GUARANTEEING UNDER ALL CIRCUMSTANCES THE RIGHT TO A FAIR TRIAL AND A REMEDY

Draft Resolution to be Considered by the Sub-Commission in 1994

1994/-- Elaboration of a third optional protocol to the International Covenant on Civil and Political Rights, aiming at guaranteeing under all circumstances the right to a fair trial and a remedy

The Sub-Commission on Prevention of Discrimination and Protection of Minorities,

Recalling its resolutions 1989/27 of 1 September 1989, 1990/18 of 30 August 1990, 1991/14 of 28 August 1991, 1992/21 of 27 August 1992 and 1993/--, in which it appointed Mr. Stanislav Chernichenko and Mr. William Treat as Special Rapporteurs on the right to a fair trial and entrusted the Special Rapporteurs with the preparation of a study on the right to a fair trial,

Recalling in particular its resolution 1992/21, in which it urged the Special Rapporteurs to make suggestions on how the right to a fair trial might be further protected, notably by making the right, or certain aspects of the right, non-derogable,

Having examined the preparatory report (E/CN.4/Sub.2/1990/34), the preliminary report (E/CN.4/Sub.2/1991/29), the progress reports (E/CN.4/Sub.2/1992/24 and Add.1-3 and E/CN.4/Sub.2/1993/--) and the final report (E/CN.4/Sub.2/1994/--) submitted by the Special Rapporteurs,

Welcoming the Special Rapporteurs' recommendation that the Sub-Commission consider ways of strengthening the right to a fair trial by, for example, making non-derogable the right to a fair trial, certain aspects of that right, and/or the right to an effective remedy against arbitrary or prolonged detention.

Welcoming also the Special Rapporteurs' recommendation in their reports that the elaboration of a third optional protocol to the International Covenant on Civil and Political Rights be considered,

1. Expresses its deep appreciation to the Special Rapporteurs for their thorough analysis of the need for a third optional protocol and their study of the right to a fair trial and to a remedy;

2. Decides to transmit the draft third optional protocol to the International Covenant on Civil and Political Rights, aiming at guaranteeing under all circumstances the right to a fair trial and a remedy, prepared by the Special Rapporteurs (E/CN.4/Sub.2/1994/--), to the Commission on Human Rights.

* * *

Draft to be considered in 1995

1995/-- Elaboration of a third optional protocol to the International Covenant on Civil and Political Rights, aiming at guaranteeing under all circumstances the right to a fair trial and a remedy

The Commission on Human Rights,

Recalling its resolution 1990/108 of 7 March 1990 in which it welcomed the decision of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to appoint Mr. Stanislav Chernichenko and Mr. William Treat as Special Rapporteurs on the right to a fair trial and its resolutions 1991/43 of 5 March 1991, 1991/14 of 28 August 1991 and 1992/34 of 28 February 1992, as well as its decision 1993/106 of 5 March 1993 and 1994/-- of -- March 1994,

Recalling also its resolutions 1992/35 of 28 February 1992 and 1993/36, of 5 March 1993, in which it called on States to establish a procedure such as habeas corpus and to make it non-derogable,

Having examined the preparatory report (E/CN.4/Sub.2/1990/34), the preliminary report (E/CN.4/Sub.2/1991/29), the progress reports (E/CN.4/Sub.2/1992/24 and Add.1-3 and E/CN.4/Sub.2/1993/24 and Add.1-2) and the final report (E/CN.4/Sub.2/1994/--) submitted by the Special Rapporteurs,

Welcoming the recommendation in the Special Rapporteurs' progress report that their study consider ways of strengthening the right to a fair trial by, for example, making non-derogable the right to a fair trial, certain aspects of that right, and/or the right to an effective remedy against arbitrary or prolonged detention,

Welcoming also the Special Rapporteurs' recommendation in their reports that the elaboration of a third optional protocol to the International Covenant on Civil and Political Rights be considered,

Taking note of Sub-Commission resolution 1994/-- in which the Sub-Commission decided to transmit the draft third optional protocol to the International Covenant on Civil and Political Rights to the Commission for consideration,

Having examined the proposed third optional protocol annexed to resolution 1994/--,

Wishing to give States Parties to the International Covenant on Civil and Political Rights which choose to do so the opportunity to become parties to a third optional protocol on the right to a fair trial and a remedy,

1. Expresses its deep appreciation to the Special Rapporteurs of their thorough analysis of the need for a third optional protocol and their study of the right to a fair trial and to a remedy;

2. Decides to transmit to the General Assembly, through the Economic and Social Council, the draft third optional protocol to the International

Covenant on Civil and Political Rights, aiming at guaranteeing under all circumstances the right to a fair trial and a remedy, as well as the comments expressed thereon at the forty-sixth session of the Sub-Commission and at the fifty-first session of the Commission on Human Rights;

3. Requests the Secretary-General to bring the draft prepared by the Special Rapporteurs to the attention of all Governments and to invite the Governments and non-governmental organizations to communicate to him, well in advance of the fiftieth session of the General Assembly their comments on the text of the draft third optional protocol;

4. Requests the Secretary-General to submit to the General Assembly for consideration at its fiftieth session the aforementioned text and a report containing the views expressed thereon by Governments;

5. Recommends that the General Assembly consider taking suitable action on a third optional protocol on the right to a fair trial and a remedy.

* * *

Draft to be considered in 1995

1995/-- Elaboration of a third optional protocol to the International Covenant on Civil and Political Rights, aiming at guaranteeing under all circumstances the right to a fair trial and a remedy

The Economic and Social Council,

Decides to transmit the following draft resolution for consideration by the General Assembly at it fiftieth session:

* * *

Draft to be considered in 1995

Elaboration of a third optional protocol to the International Covenant on Civil and Political Rights, aiming at guaranteeing under all circumstances the right to a fair trial and a remedy

The General Assembly,

Recalling articles 8, 10 and 11.1 of the Universal Declaration of Human Rights adopted in its resolution 217 A (III) of 10 December 1948, which affirm the right of everyone to an effective remedy, to a fair and public hearing by an independent and impartial tribunal, and to the right to be presumed innocent until proven guilty,

Recalling also article 14 of the International Covenant on Civil and Political Rights contained in the annex to its resolution 2200 A (XXI) of 16 December 1966, which reaffirms the right of every individual to a fair and public hearing,

Recalling further articles 9.3 and 9.4 of the International Covenant on Civil and Political Rights which require States Parties to that Convention to ensure that an arrested or detained person be brought promptly before a judge or similar officer and that anyone who is deprived of liberty be entitled to take proceedings before a court in order that the court may without delay determine the lawfulness of his detention and order his release if the detention is not lawful,

Noting that the fair trial provisions in articles 5, 6 and 7 of the African Charter on Human and Peoples' Rights are non-derogable,

Noting also that the "judicial guarantees for the protection of [the rights made non-derogable by article 27]" of the American Convention on Human Rights are also non-derogable,

Noting further the guarantees of a fair trial and a remedy incorporated in articles 5, 7, 12, 13 and 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Noting that articles 96 and 99 to 108 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War prescribe the rights of prisoners of war in judicial proceedings; that articles 54, 64 to 74, and 117 to 126 of the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War provide for the right to a fair trial and a remedy in occupied territories, and extend fair trial guarantees in international armed conflicts to all persons including those arrested for actions relating to the conflict,

Noting also that common article 3 of the four Geneva Conventions Relative to the Protection of Victims of Armed Conflicts and article 6 of Additional Protocol II to the Geneva Conventions contain indispensable judicial guarantees for the protection of the right to a fair trial during non-international armed conflicts,

Having examined the preparatory report (E/CN.4/Sub.2/1990/34), the preliminary report E/CN.4/Sub.2/1991/29), the progress reports (E/CN.4/Sub.2/1992/24 and Add.1-3 and E/CN.4/Sub.2/1993/24 and Add.1 and 2) and the final report (E/CN.4/Sub.2/1994/--) submitted by the Special Rapporteurs,

Mindful of its resolution 41/120 of 4 December 1968 on the setting of international standards in the field of human rights,

Wishing to give States Parties to the International Covenant on Civil and Political Rights that choose to do so the opportunity to become parties to a third optional protocol to that convention,

ANNEX

Third Optional Protocol to the International Covenant on Civil and Political Rights, aiming at guaranteeing under all circumstances the right to a fair trial and a remedy

The States parties to the present Protocol,

Guided by articles 8, 10 and 11 of the Universal Declaration of Human Rights which affirm the right of every individual to a fair and public hearing by an impartial tribunal and an effective remedy,

Recalling articles 9.3, 9.4 and 14 of the International Covenant on Civil and Political Rights,

Concerned that the right to a fair trial and a remedy may be most threatened during a time of public emergency,

Desiring to undertake an international commitment to protect in all circumstances the right to a fair trial and a remedy by adding the rights referred to in articles 9.3 and 9.4 and 14 to the rights which are non-derogable under article 4 of the International Covenant on Civil and Political Rights,

Have agreed as follows:

Article 1

No derogation from article 9 (3), article 9 (4) or article 14 of the International Covenant on Civil and Political Rights may be made under the provisions of article 4 of the Covenant.

Article 2

No reservation is admissible to the present Protocol.

Article 3

The States Parties to the present Protocol shall include in the reports they submit to the Human Rights Committee, in accordance with article 40 of the Covenant, information on the measures that they have adopted to give effect to the present Protocol.

Article 4

With respect to the States Parties to the Covenant that have made a declaration under article 41, the competence of the Human Rights Committee to receive and consider communications when a State Party claims that another State Party is not fulfilling its obligations shall extend to the provisions of the present Protocol, unless the State Party concerned has made a statement to the contrary at the moment of ratification or accession.

Article 5

With respect to the States Parties to the first Optional Protocol to the International Covenant on Civil and Political Rights adopted on 16 December 1966, the competence of the Human Rights Committee to receive and consider communications from individuals subject to its jurisdiction shall extend to the provisions of the present Protocol, unless the State Party concerned has made a statement to the contrary at the moment of ratification or accession.

Article 6

The provisions of the present Protocol shall apply as additional provisions to the Covenant.

Article 7

1. The present Protocol is open for signature by any State that has signed the Covenant.

2. The present Protocol is subject to ratification by any State that has ratified the Covenant or acceded to it. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Protocol shall be open to accession by any State that has ratified the Covenant or acceded to it.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States that have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

Article 8

1. The present Protocol shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or accession.

2. For each State ratifying the present Protocol or acceding to it after the deposit of the tenth instrument of ratification or accession, the present Protocol shall enter into force three months after the date of the deposit of its own instrument of ratification or accession.

Article 9

The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions.

Article 10

The Secretary-General of the United Nations shall inform all States referred to in article 48, paragraph 1, of the Covenant of the following particulars:

(a) Statements made under articles 4 or 5 of the present Protocol;

(b) Signatures, ratifications and accessions under article 7 of the present Protocol;

(c) The date of entry into force of the present Protocol under article 8 thereof.

Article 11

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States referred to in article 48 of the Covenant.